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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 939

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,

Petitioner,

versus

WILLIAM H. MISSEL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

W. HAMILTON WHITEFORD,
Counsel for Respondent.

WILLIAM O. TYDINGS,
GEORGE A. MAHONE,
Of Counsel.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

The brief of respondent, William H. Missel, respectfully represents, in opposition to the Petition for a Writ of Certiorari herein, the following:

II.

(A) That nothing in this case justifies the consideration of this Honorable Court in the matter of granting the Writ of Certiorari. The questions involved are simple, few in

number, and as shown by the record have been fully and adequately discussed, analyzed, and decided by the United States Circuit Court of Appeals for the Fourth Circuit.

(B) Respondent adopts in support of his opposition to the granting of the Writ of Certiorari said decision of the United States Circuit Court of Appeals for the Fourth Circuit rendered on January 5, 1942.

III.

The petitioner's interpretation of the Fair Labor Standards Act is one of mutilating narrowness and repugnant to the intent of said Act as expressed by the plain language thereof.

IV.

The United States Circuit Court of Appeals for the Fourth Circuit did not, as alleged by Petitioner, hold that the Fair Labor Standards Act of 1938 destroyed the private right of contract; the said Circuit Court simply interpreted the contract between Petitioner and Respondent under the provisions of the said Fair Labor Standards Act of 1938.

V.

Respondent denies that the construction of the Fair Labor Standards Act of 1938 by the United States Circuit Court of Appeals for the Fourth Circuit, and the said court's application of the provisions of that Act to Respondent, conflicts with "numerous decisions of this Court" as claimed by Petitioner. Petitioner's analogies are fallacious and not in point, especially in those instances wherein petitioner attempts to justify its legal logic in the matters of "good faith litigation", and "penalties". No penalty was imposed by the said Circuit Court, nor does Section 16 (b)

of the Fair Labor Standards Act mention the word "penalty". The Circuit Court decided that the allowance of liquidated damages, as provided by Section 16 (b) of the said Act, was mandatory.

VI.

The plain and unequivocal language of Section 16 (b), of the Fair Labor Standards Act of 1938, mandatorily provides for liquidated damages, and this legislative mandate is emphasized by the word "shall". Further, the absence of the word "willfully" in Section 16 (b), eliminates any foundation or basis for a claim that "good faith litigation" can affect the allowance of liquidated damages.

VII.

It is further submitted that the decision of the United States Circuit Court of Appeals for the Fourth Circuit in this case has ample support under the authority of this Honorable Court's decision in *The United States of America v. F. W. Darby Lumber Company and Fred W. Darby*, 312 U. S. 100, where, in the concluding portion of the opinion, under the caption "Validity of the wage and hour provisions under the Fifth Amendment" it is stated:

> "Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime 'of not less than one and one-half times the regular rate' at which the worker is employed. Since our decision in the West Hotel Co. *v.* Parrish, 300 U. S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours."

VIII.

Any alleged conflict between the Fair Labor Standards Act of 1938 and the authority of the Interstate Commerce Commission under "Part 2 of the Interstate Commerce Act", Section 204 (a), et seq., so far as Respondent is concerned, it is respectfully submitted, is disposed of by the following reasoning of Judge Coleman, District Judge, United States District Court for the District of Maryland, in this case (36 F. Supp. 980), wherein, in overruling the Motion to Dismiss, he stated, in part:

> "But we do say that there is nothing in the Supreme Court's decision (i.e., in U. S. *v.* American Trucking Association, Inc., 310 U. S. 534) that is in the least indicative of the existence of power in the Commission to say that an employee's 'activities affect the safety of operation,' when such activities as those of the plaintiff in the present case have only a most remote relation to the actual movement of motor vehicles falling under the jurisdiction of the Act. Plaintiff is a rate clerk. His duties are clerical and have no direct relation to operation, other than through the tenuous argument that since motor vehicles cannot lawfully transport goods in interstate commerce until the rates or charges for so doing have been duly established and exacted, the rate clerk, therefore, performs duties relating to operation, because there can be no operation without rates. By the same argument, almost anyone employed by a motor carrier could be said to be engaged in activities related to operation,—one who types or signs a letter relating to safety measures, or prepares or signs an accident report; even the messenger boy to whom such papers are entrusted, or indeed even the janitor or scrub woman, because these make it possible for others to occupy their offices satisfactorily and to write or transmit letters or reports."

IX.

To argue, as Petitioner does, that an employee of a motor carrier is exempted from the coverage of the Fair Labor Standards Act of 1938, by virtue of Section 13 (b) of said Act, until the Interstate Commerce Commission rules that his employment does not affect the safety of operation of motor vehicles, is a "reductio ad absurdum", which absurdity is emphasized, if there be necessity for emphasis, by considering that if the Interstate Commerce Commission never acted upon the classifications of work such as performed by Respondent, the Respondent would be denied the benefits and protection of both the "Fair Labor Standards Act of 1938" and "Part 2 of the Interstate Commerce Act"—a legal exemplification of "a Mahomet's body" suspended between the Fair Labor Standards Act and the Interstate Commerce Act, touching neither nor being entitled to the aid and benefits of neither. The Rule of Reason precludes the conclusion for which Petitioner argues.

WHEREFORE, Respondent respectfully submits that the Writ of Certiorari should be denied.

Respectfully submitted,

W. HAMILTON WHITEFORD,
Attorney for Respondent.

Of Counsel:
WILLIAM O. TYDINGS,
GEORGE A. MAHONE.
February 9, 1942.